No. 3037

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

FIREMAN'S FUND INSURANCE COMPANY (a corporation),
Plaintiff in Error,

vs.

TROJAN POWDER COMPANY (a corporation),
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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I.

Statement of the Case.

A consignment of 6000 cases of high explosives, belonging to the defendant in error (plaintiff below), left San Francisco for Balboa, Panama, on the steamer "Pleiades" on August 7, 1912. The "Pleiades" stranded off the coast of Mexico on August 16, 1912, but was safely floated and returned to San Francisco, arriving in September. The explosives were received by plaintiff, and were reshipped to Balboa on October 17, 1912, on the "Mackinaw", another steamer owned and operated by the California-Atlantic Steamship Company, which also owned the "Pleiades". The plaintiff,

having prepaid its freight amounting to $4950 for the shipment on the "Pleiades" and its contract of affreightment in that instance having contained a provision that the freight should be deemed earned, "vessel or goods lost or not lost", assented to the demand of the steamship company, and paid out an additional $4050 for the reshipment on the "Mackinaw". The action was to recover from the defendant on its said policy for the $4050 so paid. The District Court allowed recovery, and the defendant brings error.

The repairs on the "Pleiades" were completed on December 27, 1912, and on that date she was turned over to the steamship company. The company however, went into bankruptcy on or about January 2, 1913, and the voyage was not completed.

The policy sued on, was a policy of marine insurance in the form known as the "English form". It contained, among others, the following provisions:

> "* * * the said INSURANCE shall and is INSURANCE (lost or not lost) at and from San Francisco Bay to Balboa.
>
> "And it is ALSO agreed and declared that the subject matter of this Policy as between Assured and the said Company so far as concerns this Policy shall be and is as follows upon $35,000—on 6000 cases High explosives.
>
> "laden (under deck) on board the ship or vessel called the Str. 'Pleiades'. * * *
>
> "* * * * All questions of liability arising under this policy are to be governed by the laws and customs of England. This Policy is issued in duplicate. Freight warranted free from any claim consequent upon loss of time whether arising from the peril of the sea or otherwise. * * *

"Warranted free from average unless general or the ship or craft be stranded, * * *

"Underwriters notwithstanding this warranty to pay for any damage caused by * * * reshipping or forwarding for which they would otherwise be liable * * * ."

The provision with reference to the prepayment of freight, contained in the bill of lading under which the explosives were shipped on the "Pleiades", read as follows:

"It is agreed that said freight, whether prepaid or to be collected, is to be considered as earned, vessel or goods lost or not lost at any stage of the entire transit; that on the happening of any of the herein provided contingencies, the carriers are to have the right to forward the above mentioned packages to the ports of destination on their own routes, and shall receive extra compensation for such service, whether performed by their own vessels or those of strangers; * * *"

No evidence was offered that this bill of lading was ever brought to the notice of the defendant (plaintiff in error), or that the defendant in fact had notice of its terms or particularly of the provision as to the prepayment of the freight, "goods lost or not lost".

The circumstances under which the 6000 cases of explosives were reshipped after their return to San Francisco on the damaged "Pleiades", and the reasons for such reshipment were testified to by Mr. W. P. Mulhern, the manager of the plaintiff company. According to Mr. Mulhern, the explosives were returned to San Francisco in September—sometime after September 7, 1912,—and in behalf of the plaintiff company, he at once took steps to see that they should be reshipped to

Panama on the first steamer leaving for Balboa (Tr. p. 53). The "Mackinaw", which was to sail on October 17, 1912, was the first vessel leaving San Francisco for Balboa after the return of the explosives. Mr. Mulhern arranged for the transportation of the explosives on the "Mackinaw", and upon the refusal of the California-Atlantic Steamship Company to transport the explosives on this vessel without additional charge, paid the $4050. The "Pleiades" was repaired, and redelivered to the California-Atlantic Steamship Company on December 27, 1912. On or about January 2, 1913, the plaintiff company received word that the steamship company had gone into bankruptcy (Tr. p. 54).

The reasons given by Mr. Mulhern for the immediate reshipment of the explosives on the "Mackinaw" without awaiting the completion of the repairs to the "Pleiades" were: first, that under the contract which the plaintiff company had for the sale of the explosives in Panama, the plaintiff would be subject to a penalty for the delay in their arrival, and would further be subject to the possibility of having the contract cancelled for such delay; and, secondly, that the plaintiff company feared that should the delay result in such cancellation, no other market could be found for the explosives upon their arrival in Panama. The contract which the plaintiff company had for the sale of the explosives in Panama was with the Panama Canal Commission, and Mr. Mulhern stated that, in his opinion, no purchaser other than the Commission could be found for the explosives, should it become necessary to put them on the market on their arrival in Panama.

The testimony of Mr. Mulhern on this subject was very direct and very brief, and was as follows:

> "Mr. FRANK. What was the necessity of getting that cargo forwarded at that time?
>
> "A. If we did not deliver it within a certain time we were subject to a penalty of one-tenth of one per cent per day and were liable to have the shipment refused. Upon the condition their contract provided for that.
>
> "I don't believe there is any market at the port of destination other than the Panama Canal Commission for any considerable amount of explosives, and particularly, for those grades, as one of them was a grade of 45% and the other 60, and the demand for 60 is not nearly as great as the lower grades" (Tr. p. 54).

With the exception of the testimony of Mr. Mulhern as to the foregoing points and as to the service by the plaintiff on the defendant of an attempted abandonment, no testimony was offered by either party except as bearing upon the question as to what constituted the English law.

The plaintiff contended, and the District Court held, that under the law of England, the amount paid by the plaintiff for the reshipment of the explosives on the "Mackinaw" could be recovered as a "Particular Charge". In other words, it was contended by the plaintiff and held by the court, that the stranding of the "Pleiades" was a peril insured against by the policy, and that the payment of $4050 was a loss proximately resulting of such stranding, and therefore recoverable.

Plaintiff in error contends that the District Court erred in these conclusions, for the following reasons:

1. Because, under the law of England, reshipment charges cannot be recovered against the underwriter as a "particular charge" *unless they are incurred in order to prevent a loss for which the underwriter otherwise would be liable;* and because in this case it clearly appeared that the reshipment on the "Mackinaw" was not necessary to prevent a loss for which the underwriters would be liable.

2. Because, neither the stranding of the "Pleiades", nor any other peril of the seas insured against, was the proximate cause of the payment of the $4050 reshipment charge. Under this last heading, plaintiff in error contends that other intervening causes, occurring after the stranding of the "Pleiades", and after its arrival in San Francisco, were responsible for the reshipment on the "Mackinaw", and the consequent payment of the $4050 reshipment charge, and that none of these intervening causes were insured against by the policy.

Under the law of England, as fully developed by the authorities cited, the rule of *causa causans,* although applicable to other kinds of contracts, does not apply to contracts of marine insurance. With respect to contracts of marine insurance "only the *causa proxima* can be regarded".*

Upon this branch of the case, plaintiff in error contends that neither the stranding of the "Pleiades" nor any other peril of the sea insured against, was the last or proximate cause of the reshipment on the "Mackinaw", or the payment of the reshipment charges. The

* See opinion of Lord Esher in *Pink v. Fleming,* 25 Q. B. D. 396, quoted *infra.*

"Pleiades" returned to port with the cargo safely in her hold, and was, in fact, repaired and ready to proceed with the voyage on December 27, 1912. Therefore, one of two additional causes, wholly disassociated from the original stranding (the effects of which were shown to have been totally overcome by December 27, 1912) were responsible for the reshipment, and the payment of the additional reshipment charges.

The first of these intervening causes was the fact that by reason of its contract with the Panama Canal Commission, the plaintiff considered itself unable to await the completion of the repairs upon the "Pleiades". The insurance company was without knowledge of the terms of the contract between the plaintiff and the Canal Commission, was not bound by it, and was moreover, under the express terms of its policy, as well as by reason of the law of England in that behalf, not liable for any delay in the arrival of the goods at the port of destination, even though such delay might have been proximately caused by a peril insured against. Therefore, under the policy (at least so far as regards its liability for reshipment charges) the insurance company was entitled to have the explosives remain in San Francisco until the repairs upon the "Pleiades" were completed, and if this was rendered impossible by reason of the necessities of the plaintiff, arising out of its contract with the Panama Canal Commission, the proximate cause of the payment of the reshipment charges was not the stranding of the "Pleiades", nor any other peril insured against, but was the necessity of the plaintiff as aforesaid.

The second intervening proximate cause of the reshipment charges may, on the other hand, be said to have been the bankruptcy of the California-Atlantic Steamship Company. Had the "Pleiades" been repaired, she would have completed the voyage to Balboa, or at least she would have been under obligations to the defendant to complete said voyage, and if she did not, the California-Atlantic Steamship Company could not have recovered or exacted the additional freight charges from the powder company.

Furthermore, if the California-Atlantic Steamship Company had wrongfully refused to carry the cargo on the "Pleiades", the prepaid freight could have been recovered by plaintiff.

Under this heading we shall therefore argue as follows:

(a) That under the law of England in cases of marine insurance, only *the causa proxima* can be regarded to determine whether a given item of loss has been caused by a peril insured against.

(b) That an intervening proximate cause of the payment of the reshipment charges was the plaintiff's contract with the Panama Canal Commission, which was a matter not insured against.

(c) That an intervening proximate cause of the payment of the reshipment charges was the plaintiff's desire to avoid delay in the arrival of the goods at Balboa, and that such delay in arrival and any damage resulting therefrom was not a matter insured against.

(d) That the insolvency of the California-Atlantic Steamship Company was also an intervening proximate cause of the payment of the reshipment charges, and that such insolvency was not a matter insured against.

II.

Specifications of Error.

The points relied upon on this writ are covered by assignments in error as follows:

The court erred in not holding that the reshipping charges on the "Mackinaw" were not recoverable as "particular charges" under the policy, for the reason that they were not shown to have been incurred in order to prevent a loss for which the underwriters would otherwise have been liable (Assignments XXVII and XXVIII).

The court erred in not refusing plaintiff a recovery upon the ground that the reshipment upon the "Mackinaw" and the consequent payment of the reshipment charges were not the proximate results of the stranding of the "Pleiades" or of any peril insured against (Assignments of Error IV, X, XIII, XV and XXI).

The court erred in not holding that the payment of the reshipment charges was voluntary in so far as the defendant was concerned, the defendant not having had notice of the provisions of the bill of lading, and not being bound by the provisions contained in the bill of lading that the freight should be deemed earned by

the "Pleiades" goods lost or not lost (Assignment VIII, XX and XXIV).

The court erred in not holding that the necessity for the reshipment on the "Mackinaw" arose out of the necessity created by plaintiff's contract for the sale of the explosives to the Panama Canal Commission, and not out of the stranding of the "Pleiades," and that for that reason, defendant was not liable (Assignments XI, XVIII, XXV and XXVI).

The court erred in refusing to hold that the proximate cause of the reshipment on the "Mackinaw" and the incurring of the additional reshipment charges was the desire of the defendant to avoid delay in the arrival of the goods at the port of destination, and that defendant was not liable for the consequences of any delay in such arrival, and was therefore not liable for such reshipment charges (Assignment XXVI).

III.

The Argument.

The argument in behalf of the plaintiff in error is divided into two main points:

First, that under the authorities presented to the District Court, reforwarding or reshipment charges cannot be recovered against an underwriter as a "particular charge" or under the "sue and labor" clause, unless they have been incurred in order to prevent a loss for which, under the terms of the policy, the underwriter otherwise would have been liable.

Second, that in any event the reshipment of the explosives upon the steamer "Mackinaw" by the plaintiff without awaiting the completion of the repairs upon the "Pleiades", was not the proximate result of the stranding of the "Pleiades", but was the result of the necessity under which the plaintiff found itself to carry out the contract which it had with the Panama Canal Commission, and of the plaintiff's desire to avoid delay in the performance of that contract.

We shall take these two matters up in order.

(1)

THE $4,050 RESHIPMENT CHARGES ON THE "MACKINAW" COULD NOT BE RECOVERED BY DEFENDANT AS A "PARTICULAR CHARGE" BECAUSE, UNDER THE LAW OF ENGLAND FORWARDING OR RESHIPMENT CHARGES ARE ONLY RECOVERABLE WHERE IT IS SHOWN THAT THEY ARE MADE IN ORDER TO AVOID A LOSS WHICH WOULD OTHERWISE FALL UPON THE INSURER.

The basis upon which the trial court determined the English law applicable to the case, was made up of certain sections of the English Marine Insurance Act, supplemented and interpreted by various text writers and English decisions. The determinations by the District Court on the question of the English law were therefore merely conclusions of law, and are reviewable on this writ of error.

The Maritime Insurance Co. v. M. S. Dollar Steamship Co., 177 Fed. 127;

Mexican National Ry. v. Slater, 115 Fed. 593-608; also 194 U. S. 120;

Consequa v. Willings, 1 Peters C. C. 225; Fed. Cas. 3128;

Story's Conflict Laws, Sec. 638;

Greenleaf on Evidence, Sec. 468;

Wigmore on Evidence, Par. 2558;

13 Am. and English Encyclopedia of Law, (2nd ed.) 1078.

The English statutes and authorities wholly fail to establish, as contended by plaintiff, and held by the District Court, that when a vessel returns in safety to the port of departure, forwarding charges to the port of discharge may be recovered against the underwriters under the circumstances shown and admitted to exist in the present case.

(a) Plaintiff claimed recovery of the $4050 as a particular charge. "Particular charges" are, under the English law, on the same footing as recoveries under the sue and labor clause.

Plaintiff offered text writers and other authorities to prove that "particular charges" as distinguished from "particular average" might be recovered against the underwriters.

Arnould on Marine Insurance, (8th ed.) Sec. 214 (Tr. p. 56);

Arnould on Marine Insurance, (8th ed.) Sec. 869 (Tr. p. 57);

Kidston v. Empire Insurance Co., Ltd., 1 Com. Pleas, L. T. 535; 14 English Ruling Cases 246.

The theory under which the recovery was allowed in this case was, therefore, that the payment of the

$4050 was a "particular charge" and partook of the nature of particular average. Particular charges are not, however, included in particular average under the express provisions of the English Marine Insurance Act.

Section 64 of the English Marine Insurance Act provides as follows:

> "(1) A particular average loss is a partial loss of the subject-matter insured, caused by a peril insured against, and which is not a general average loss.
>
> (2) Expenses incurred by or on behalf of the assured for the safety or preservation of the subject-matter insured, other than general average and salvage charges, are called particular charges. *Particular charges are not included in particular average.*"

It follows that particular charges partake of the nature of recoveries under the sue and labor clause, and are subject to the rule that they must only include expenditures which tend to prevent a loss for which recovery otherwise might be had against the underwriters.

(b) The authorities cited show that under the English law, expenditures for reshipment may only be recovered against the underwriters in those cases where they are made to prevent a loss for which the underwriters would otherwise be liable under the terms of the policy.

We shall call the court's attention first to the English case in which the facts were sufficiently similar to those involved in the cases at the bar, to make it afford a clear illustration of the rules which we contend

should have been applied by the District Court in the present case. In this case the transshipment occurred, not from the point at which the voyage had been interrupted, but after the vessel had returned to the port of departure, and the provisions of the policy sued upon contained nothing to differentiate it from the policy here under consideration.

> *Great Indian Peninsula Ry. Co. v. Saunders,* 1 Ellis, Best & Smith, Q. B., 41; 121 English reprint 630.

The plaintiff had shipped a consignment of rails from London to Bombay upon the ship "Bombay". On November 2, 1858, the plaintiff paid in advance to the owners of the "Bombay" the sum of £629, 9s 10d, being the whole of the freight. On November 11, 1858, the plaintiffs effected a policy of insurance upon the rails with Lloyds, for the sum of £4500. Soon thereafter, the "Bombay" sailed, but encountered heavy weather and was compelled to put back to Plymouth in a disabled condition. She arrived in Plymouth December 25, 1858, and was so badly damaged that it became necessary to abandon the voyage. The plaintiffs thereupon took the rails from the "Bombay", sent them to London, and from there had them reshipped to Bombay upon three other vessels, paying therefor additional freight aggregating £825, 11s, 7d. They thereupon sued the underwriters to recover the amount of this extra payment.

The Court of Common Pleas gave judgment for the defendant, the first ground of the decision being that the policy contained a warranty against particular

average. The plaintiffs, however, contended that although they were foreclosed from recovering the reshipment charges as particular average, they could nevertheless recover them under the "sue and labor" clause contained in the policy. The answer which Blackburn, J., made to this contention, was to all intents and purpose identical with that which is made by the defendant in the case at bar. It was pointed out *that the goods had been returned in an unharmed condition and that they were in no danger of suffering any loss for which the underwriters might be made liable under the policy.* For that reason, the court said, the underwriters could not be held liable for the reshipment charges. Blackburn, J., said:

> "It was, however, further argued by Mr. James that the plaintiffs were entitled to recover under the clause which authorizes the insured to sue and labor for the preservation of the subject-matter of the insurance. It is not necessary to decide whether an underwriter on a policy against total loss only is, (60) under this clause, liable for expenses incurred by the assured for the purpose of rescuing the subject-matter of an insurance from a state of peril which might have resulted in a total loss, but did not. There are reasons both for and against this stated by Mr. Phillips in his Treatise on Insurance, Sec. 1777; and the question seems never to have been actually decided. But in the present case it does not arise. The expenses here were incurred for the purpose of forwarding the subject-matter of insurance to its destination, at a time when the iron was not in any peril of total loss, either actual or constructive. Had the insured chosen, instead of paying this extra freight, to sell the rails in England, as he might have done if he pleased, he could have made no claim on the underwriters; for it would not

> have been a constructive total loss, according to *Rosetto v. Gurney,* 11 C. B. 176 (E. C. L. R., Vol. 73), unless the amount of the extra freight exceeded the value of the goods when forwarded which is not the case here; and an actual total loss is out of the question."

The case was appealed and the judgment for the defendant was affirmed.

> *Great Indian Peninsula Railway Co. v. Saunders,*
> 2 Best & Smith Rep. (Q. B.) 266.

On the appeal the argument was again made by the plaintiff that the expenses of the reshipment could be recovered under the "sue and labor" clause, and the Higher Court answered the contention in the same manner in which it had been met in the lower court, Erle, J., saying:

> "But Mr. James ably argues that the plaintiffs are entitled to recover this money; not as compensation for the loss of the goods within the general language of the policy; but as the expense of forwarding them to their destination in other vessels, under what has been called 'the labour and travel clause', which empowers the assured to sue, labour, and travel to save the thing assured from impending loss. The substantial ground, however, on which I decide this case is entirely beside his able argument. The expenses that can be recovered under the suing, labouring and travelling clause are expenses incurred to prevent impending loss within the meaning of the policy. Now, here the goods were given up to the plaintiffs in perfect safety; and the question is, were these expenses incurred to prevent a total loss? Had the owners a right to turn the transaction into a total loss?

> Certainly not, for they had the goods in specie, and consequently that £825 11s. 7d. had no reference to suing, labouring, or travelling in order to prevent such a loss."

It cannot be said that the authority of the case just cited is destroyed, because of the fact that the policy involved in it contained a warranty against particular average. The policy involved in that case was practically identical with the policy involved in the case at bar. *It was a policy upon cargo and not upon freight.* This being the case, the English court held that when the cargo was safely restored to the port of departure, the underwriters could not be made liable for additional reshipment expenses to the ultimate port of destination.

This point is deserving of the court's most careful consideration for the reason that in the cases relied upon most strongly by plaintiff, *the policies were upon freight,* or *upon freight* as well as cargo, and for that reason the underwriters could be held responsible to the assured unless the cargo actually arrived at the port of destination.

In only one of the other cases offered in the District Court did it appear that the insured cargo was actually returned to the port of departure and reshipped therefrom. Plaintiff in the court below placed great reliance upon this case. It was, however, clearly distinguishable from the case at bar owing to the peculiar state of facts involved, and particularly owing to the fact that the

policy expressly covered the assured against all forwarding charges.

Popham and Willett v. The St. Petersburg Ins. Co., 10 Com. Cas. 31;

Popham and Willett v. The St. Petersburg Ins. Co., 10 Com. Cas. 276.

The policies involved in this case were not ordinary English form policies, but were contracts of insurance of an unusual type, drawn for the purpose of covering a peculiar mercantile adventure. The plaintiffs had for several years prior to 1899, successfully imported cargoes of merchandise into Siberia, via the Kara Sea, their purpose in choosing such a route being the saving of the excessive duties which were involved by import into Siberia through western Russia. In 1899 the plaintiffs proposed such an expedition, and sent out upon it four steamers which they chartered, and one which they owned. These steamers were laden in part with goods owned by the plaintiffs, and in part with goods which were owned by other persons. The plaintiffs, however, made freight charges both against the goods owned by outside parties, and against their own goods. They thereupon insured themselves, both for the freight which was to be earned and also, for the goods contained in the vessels, whether belonging to themselves or to other shippers. The nature of the insurance was therefore dual—it was insurance *upon freight* and also insurance upon cargo. It was moreover insurance of a peculiar type in effect designed to insure the success of speculative venture—to insure to plaintiffs the realization of their profit upon the

earning of the freight, the success of their venture, and, as well, the safety of the goods. Owing to the subject matter of the insurance, therefore, the ultimate arrival of the goods at the port of destination was insured against, whereas in the ordinary English form policy of insurance upon goods alone as distinguished from freight, the ultimate arrival of the goods at the port of destination was not insured against.

The specific ground upon which the case is distinguishable however from the case at bar, lies in the fact that the policies involved contained the following provision:

> "To pay landing, warehousing, *and forwarding charges,* should the same be incurred, *as well as partial loss arising from transshipment and reshipment.*"

The vessels proceeded to the Siberian coast, but, in August of 1899, they encountered ice drifts caused by an unusual prevalence of northeasterly winds. As a result, four of the vessels were damaged, and one was lost, and the goods were all returned to London. They were thereafter reshipped to Siberia through Russia, and large reshipment charges were incurred as well as heavy charges for duties. The plaintiff sued on the policies to recover for the landing, warehousing, and forwarding expenses, and for the extra duties.

In the first report of the case (10 Com. Cases 31), Walton, J., held that the weather conditions which led to the loss were perils constituting a peril insured against under the policies; that the plaintiffs could not recover for a constructive total loss because of their

failure to give notice of abandonment; and lastly, that the warehousing and forwarding charges, and the extra duties, could be recovered as partial losses. This holding, however, rested necessarily upon the proposition that the policies expressly insured the matters for which recovery was allowed under the clause above quoted from the policies. The second report of the case (10 Com. Cas. 276) simply involved a dispute as to the details of the recovery allowed under the first judgment. In the second report however, it appears that the plaintiffs were allowed to recover for the profits on freight which they would have realized had the first voyages been successful, which emphasizes the point that in the policies under consideration the subject matter of the insurance was such that the ultimate arrival of the goods at destination was guaranteed by the insurer and not alone the safety of the goods. In no way can this case be deemed authority applicable to the situation presented to the case at bar.

In fact, plaintiff's only contention in the District Court was that the case was authority for the proposition that the second shipment was a part of the original forwarding of the goods. A complete answer to this contention is found in the provision of the policy above quoted. Under such provisions the insured were insured against forwarding charges, should the same be insured, *as well as* partial loss arising from transshipment and reshipment. The insured were protected, not only against "transshipment" charges, but also "reshipment" charges as distinguished from transshipment charges. It cannot be said that a policy, made

under circumstances shown to have existed in that case, and containing such express equivocal language with respect to the very subject-matter of reshipment charges, is to be deemed authority with reference to a policy in the ordinary English form with no express provisions whatever with respect to reshipment. The case of *The Great Indian Peninsula Railway Co. v. Saunders,* supra, stands uncontradicted as authority for the proposition that under such a policy, the reshipment of the goods, after they had been returned safely to their home port, does not create a charge which is recoverable against the underwriters.

Booth v. Gair, 15 Com. Bench Reps. (N. S.) 290.

The plaintiffs shipped a consignment of bacon from New York to Liverpool. Upon leaving New York the vessel met heavy gales, and was compelled to put in at Bermuda, where she became a total loss and was sold. The bacon was taken from the vessel in an undamaged condition, and the master transshipped it from Bermuda to Great Britain, and prepaid reshipment charges which exceeded the amount of the freight agreed to be paid. The plaintiffs had insured the bacon with the defendant under a policy which was warranted free of particular average, and which contained an ordinary "sue and labor" clause. Upon arrival of the cargo in England, the plaintiffs sued the defendant for the difference between the amount of freight which they had agreed to pay on the first vessel, and the larger amount which they were compelled to pay by reason of the reshipment. It was held upon the authority of *Great Indian Peninsula Railway Co. v. Saun-*

ders, supra, that the plaintiffs could not recover. Erle, C. J., who delivered the opinion to the court, again placed his judgment upon the fact that the reshipment was not for the purpose of avoiding any loss which, under the policy, might have otherwise fallen upon the underwriters, saying:

> "What the master did in this case was in discharge of his duty in ordinary course; and there was no peril creating a risk of a total loss from which the underwriter was saved by the expenses in question. There were no other perils than such as are always attendant on the transit of goods by the voyage in question.
>
> "If the assured intended to confine the warranty to a partial loss from damage to the cargo, and to have the liability of the underwriter for expenses of transshipment, in our opinion this policy does not express that intention. Judgment for the defendant."

The case of

> *Kidston v. The Empire Marine Insurance Co., Ltd.,* 1 Com. Pleas L. R. 535; 14 English Ruling Cases, 247,

in which a recovery was allowed under the "sue and labor" clause, contains many points which distinguish it from the case at bar, but none the less affords striking proof that the English rule *prevents the recovery of reshipment charges except where they are shown to have been incurred for the purpose of preventing a loss for which the underwriters would otherwise be liable.*

In that case, the plaintiffs, being the owners of the ship "Sebastopol," chartered her to Messrs. Thomson

& Co. for a voyage to the Chincha Islands, off the western coast of South America, for the purpose of bringing a cargo of guano from said islands to England. The freight was to be payable, £1000 upon the arrival of the "Sebastopol" at the port of discharge in England, and the balance "48 hours after the true and right delivery of the whole cargo". Plaintiffs then took out insurance with the defendants, and what they insured was not the cargo, (plaintiffs did not own the cargo) *but was the freight which was to become due them from Messrs. Thomson & Co. when the vessel arrived at port of discharge, and later discharged the cargo.*

It is clear that for this reason alone the case is completely distinguishable, both from the case of *Great Indian Peninsula Railway Co. v. Saunders,* supra, and from the case at bar, because what the underwriters were undertaking was that the insured should receive their freight money, and obviously the insured could not receive his freight money unless the cargo of guano arrived and was discharged in England. In other words, the subject-matter of the contract of insurance involved in the case of *Great Indian Peninsula Railway Co. v. Saunders,* supra, was the consignment of rails, and in the case at bar, was the consignment of 6000 cases of high explosives, whereas in the case now under discussion, the subject of insurance was the *freight money to become due to the owners of the "Sebastopol" when the "Sebastopol" arrived and discharged its cargo.* This was expressly pointed out by the Appellate Court when the case was heard on appeal, Kelly, C. B., saying:

> "The cases of *Great Indian Peninsular Railway Co. v. Saunders,* and of *Booth v. Gair* have been pressed upon the attention of the court, as showing that a loss of this nature is a partial loss only, and cannot be recovered against the underwriters by reason of the warranty against particular average. *But these were cases of insurance upon goods,* to which the *pro rata* doctrine has no application, and where, the whole or a great portion of the goods still existing in specie, it was impossible to hold that a total loss had arisen. *And Mr. Justice Blackburn appears to have marked the distinction between the case of goods and that of freight,* and forborne to intimate any opinion upon the point which we now have to determine." (Italics ours.)

The "Sebastopol" proceeded to the Chincha Islands, received the cargo of guano on board, but met with heavy weather coming through the Straits of Gibraltar, and was compelled to put in at Rio Janeiro, where she became a total loss. The master thereupon transshipped the cargo of guano on the ship "Caprice", which carried it safely to England. The cost of the reshipment of the guano on the "Caprice" was £2467, 11s, 10d. The court held that notwithstanding the warranty against particular average which the policy contained, the cost of reshipment was recoverable under the "sue and labor" clause in the policy. Particular emphasis was put however, upon the fact that the subject matter of the insurance was the freight moneys, Willes, J., saying:

> "As to the first question, it was hardly disputed that the expenses incurred were of a character to be within the clause. *Without incurring them the subject-matter of the insurance never would have had any complete existence.* They were incurred in order to earn it; and they represented so much

> labour beyond and besides the ordinary labour of the voyage, *rendered necessary for the salvation of the subject-matter of insurance,* by reason of a damage and loss within the scope of the policy, the immediate effect of which was that the subject-matter insured would also be lost, or rather would never come into existence, unless such labour was bestowed. As the goods lay at Rio, *no part of the chartered freight had accrued* due, and no freight even *pro rata itineris* could have been claimed by the shipowner." (Italics ours.)

The controlling element in the mind of the court in permitting the recovery of the transshipment charges on the "Caprice", was the fact that those expenses prevented a loss for which, had the cargo of guano not gone forward, the freight would not have been earned and the defendant would have been liable to the plaintiff therefor. The court said:

> " * * * the measures taken by the plaintiff to avert that loss, and the expense incurred therein, were taken and incurred for the benefit of the underwriters, in averting a loss for which they would have been liable; and so that they were within the suing and labouring clause, and that the underwriters are liable to contribute thereto."

The same conclusion and the same reasoning were followed when the case was affirmed on appeal.

> *Kidston v. Empire Marine Insurance Co.,* 2 Com. Pleas L. R. 357.

The appellate court said, speaking through Kelly, C. B.:

> " * * * on the destruction of the ship and the landing of the cargo at Rio there was a total loss of the freight, unless it could be averted by the forwarding of the cargo by another ship to Great Brit-

> ain; that the forwarding the cargo by the 'Caprice' was a particular charge within the true meaning of the suing and labouring clause * * *; and that the due proportion of that particular charge, that charge being thus within the suing and labouring clause, *and incurred for the benefit of the underwriters to preserve the subject of insurance,* and to prevent a total loss, is recoverable under the policy in this action." (Italics ours.)

Another application by the English courts of the rule that only expenditures which avert a loss recoverable against the underwriters can be recovered as particular charges or as recovery under the "sue and labor" clause, is found in the case of

> *Meyer and Others v. Ralli and others,* III Aspinall's Maritime cases, 324.

The plaintiffs insured 18,759 kilogrammes of rye on a voyage in the Austrian ship "Unico", from Enos, a Turkish port, to Schiedam, in Holland. The rye was insured by the defendants under a policy warranted free from particular average. The "Unico" sailed from Enos in November, 1865, and was shortly thereafter disabled in a storm off the coast of France, and was taken into port at La Rochelle, France. The vessel was tied up by various proceedings instituting the courts of France, and the cargo, after many months delay, was finally sold. The owners of the cargo brought suit on the policy to recover the various items of loss arising out of the failure of the voyage, expenses incurred, and losses sustained by reason of the small price which was received for the rye at La Rochelle, when it would have brought considerably more at Schiedam. The English

court held that the greater portion of the loss, including the difference between the amount realized on the grain and that which it should have brought, was not attributable to peril of the seas, but was attributable to error of judgment of the captain of the "Unico", who should have transshipped. Recovery was allowed, however, for the expenses to which the plaintiffs were put in connection with the sale of the grain, the court holding that such expenses were made for the purpose of avoiding and preventing a total loss, for which the underwriters would have been responsible.

The court even went to the extent of ordering a reference to determine just what items were recoverable under this head, holding that only such items as were incurred for the purpose of preventing a loss for which the underwriters might have otherwise been liable, were recoverable. Archibald, J., saying:

> "A more difficult question is as to the amount of expenses recoverable under this head. This depends, in our opinion, upon the amount of expenses necessary to avert a total loss *for which alone the defendants were liable.*" (Italics ours.)
>
> *Barker v. Blakes,* 9 East's Rep. 282.

This case was decided by Lord Ellenborough sitting in a *nisi prius* court in 1803. If in conflict with the cases above noted, it must be deemed to that extent overruled by them, and in any event, having been decided in a court of inferior jurisdiction, would be overborne by them.

Moreover, in the report of the case it is recited as follows:

> "The court, from the extensive consequences involved in the determination of the general question, wished to have had the case argued again; but understanding that the value of the property was inconsiderable, and that the parties were disinclined to incur any further expense, they said they would consider of it, and give their opinion another time."

The plaintiff had shipped a quantity of oil in August, 1803, on the steamer "Hannah" from New York to Havre de Grace, and had insured the oil for the voyage with defendant. The "Hannah" was an American ship, and on the voyage to France was arrested by a British privateer and taken to Bristol, where she was searched for contraband goods. Ultimately the "Hannah" was released and the cargo ordered restored to the use of the owners. In the meantime, however, war was declared between France and England and the port of Havre de Grace was closed by the English authorities. For this reason the commander of the "Hannah" refused to proceed with the voyage and it became impossible for the plaintiff to ship the oil to France. Under these circumstances the oil was sold in England, and the plaintiff sued the insurance company for his loss on the oil and for certain charges for freight and other expenses which had been imposed upon it by the English court. *Lord Ellenborough, C. J.,* held that the plaintiff was not entitled to recover a total loss owing to his failure to give a timely notice of abandonment, but permitted recovery for the amounts paid for additional freight expenses.

In view of the foregoing authorities, it is submitted that the English rule is unquestionably that reshipping

or forwarding charges cannot be recovered against the underwriters, either as particular average or as particular charges, or as a recovery allowable under the "sue and labor" clause, *unless such forwarding charges are incurred for the purpose of preventing a loss which would otherwise be incurred by the underwriters under the terms of the policy.*

It is submitted that the case of

The Great Indian Peninsular Ry. Co. v. Saunders, supra,

is directly in point, and that it should control the determination of this branch of the case. Inasmuch as the policy herein sued upon was a contract of insurance *upon specific goods,* and *not upon freight,* and inasmuch as the payment of $4050 for the reshipment upon the Str. "Mackinaw" was not (even assuming it to have been proximately caused by the stranding of the "Pleiades") a payment for the purpose of preventing a loss for which the underwriters would otherwise have been liable, the District Court erred in permitting the plaintiff to recover.

(2.)

NEITHER THE STRANDING OF THE "PLEIADES" NOR ANY OTHER PERIL INSURED AGAINST, WAS THE PROXIMATE CAUSE OF THE PAYMENT OF THE RESHIPMENT CHARGES.

Upon the first branch of the argument we have contended that the $4050 reshipment charges, were not, under the law, recoverable against the defendant as a

particular average charge *for the reason that it was not paid in order to avoid the incurring of a loss which otherwise would have been recoverable under the policy.*

Assuming that the court should hold against us on this point, nevertheless we contend that plaintiff in error cannot be held liable for the payment of such reshipment charges. Under the English law, as thoroughly laid down by the authorities, only such losses are recoverable against the underwriters, *as are the proximate results of a peril insured against.* Upon this branch of the case we contend that the defendant is not liable for the payment of these charges *because the stranding of the "Pleiades" did not necessitate their payment.* Two other distinct causes intervened, making the reshipment necessary; first, the contract of the plaintiff with the Panama Canal Commission with the resulting necessity of the plaintiff to avoid delay in the performance of such contract; and secondly, the bankruptcy of the California-Atlantic Steamship Company, the owner of the "Pleiades", which resulted in the abandonment of the voyage. Neither of these last mentioned causes were insured against by the policy, and therefore plaintiff in error cannot be held liable.

(a) Under the law of England in cases of marine insurance, only the causa proxima can be regarded in determining whether or not a given item of loss has been caused by a peril insured against.

In

Pink v. Fleming, 25 Q. B. D. 396,

Lord Esher, M. R., points out that under English law a stricter rule governs in applying the doctrine of prox-

imate cause in cases of marine insurance than in the case of ordinary contracts. He points out that while in the case of ordinary contracts the rule of *causa causans* governs, nevertheless in the case of marine insurance, the rule of *causa proxima* must control. In other words, Lord Esher holds, that in cases where two causes combine to produce a given loss, it is the last cause which must be regarded. Lord Esher states the rule as follows:

> "In cases of marine insurance the liability of the underwriters depends upon the proximate cause of the loss. In the case of an action for damages on an ordinary contract, the defendant may be liable for damage, of which the breach is an efficient cause or *causa causans;* but in cases of marine insurance only the *causa proxima* can be regarded. This question can only arise where there is a succession of causes, which must have existed in order to produce the result. Where that is the case, according to the law of marine insurance, the last cause only must be looked to and the others rejected, although the result would not have been produced without them."

In the case which was before the English court, there had been a collision, with the result that the ship had to be taken to port for repairs. Thereafter the insured goods were landed, and were injured by the way in which they were handled while being landed. What Lord Esher said in the portions of the opinion above quoted was in response to the argument that the collision, a peril insured against, "was the proximate cause of the damage to the goods." Applying the rules which were laid down in the above language to the facts before him, Lord Esher said:

"Here there was such a succession of causes. First, there was the collision. Without that no doubt the loss would not have happened. But would such loss have resulted from the collision alone? Is it the natural result of a collision that the ship should be taken to a port for repairs, and that the cargo should be removed for the purposes of the repairs, and that, the cargo being of a kind that must be injured by handling, it should be injured in such removal? A collision might happen without any of these consequences. If it had not been for the repairs, and for the removal of the cargo for the purpose of such repairs, and for the consequent delay and handling of the fruit, the loss would not have happened. The collision may be said to have been a cause, and an effective cause, of the ship's putting into a port and of repairs being necessary. For the purpose of such repairs it was necessary to remove the fruit, and such removal necessarily caused damage to it. The agent, however, which proximately caused the damage to the fruit was the handling, though no doubt the cause of the handling was the repairs, and the cause of the repairs was the collision. According to the English law of marine insurance only the last cause can be regarded. There is nothing in the policy to say that the underwriters will be liable for loss occasioned by that. To connect the loss with any peril mentioned in the policy, the plaintiffs must go back two steps, and that, according to English law, they are not entitled to do."

A number of other English cases are presented in which intervening causes were in a similar manner held to prevent recovery.

Powell v. Gudgeon, 5 Maule & Selwyn's Rep., 431.

The vessel, by reason of damage by peril of the sea, was compelled to put into port for repairs. The captain, being unable to obtain money for the necessary

repairs in any other manner, was compelled to sell a portion of the goods. Plaintiffs, the owners of the goods, sued their insurers to recover the loss sustained because of the sale of the goods. Lord Ellenborough held that the insurers were not liable because, while the peril of the seas and the injury to the ship created a situation which made it necessary for the vessel to be repaired, it did not proximately cause the sale of the plaintiffs' goods. That sale was occasioned by reason of the necessities of the captain, which constituted a separate intervening, proximate and last cause, and not covered by the insurance policy. Lord Ellenborough adopted exactly the same rule as that laid down by Lord Esher in the case last cited and applied it in exactly the same manner, saying:

> "Laying out of the case the opinions of foreign jurists, and all which does not properly bear on the point in question, I am inclined to think the damage in this case is to be considered as not arising immediately from a peril of the sea, although in a remote sense, it may be said to have been brought by a peril of the sea; but our rule of construction is, *causa proxima non remota spectetur*. The injury to the assured was caused by the sale of their goods; but no one will contend that the sale was an immediate consequence of a peril of the sea. The peril of the sea damaging the ship rendered it innavigable; to restore its navigability a refitment became necessary. The captain, who was interested in and bound to have the ship in a navigable state, being unable to raise the means for refitting her, was obliged to apply to the owners of the goods for a loan, through the medium of a sale of part of the goods. It was therefore a sort of forced loan which was the proximate cause of loss to the owners from the sale of their goods.

> This was indeed connected with a peril of the sea, because a peril of the sea occasioned damage to the ship, which made repairs necessary, and funds to provide these repairs; but it was the want of funds *aliunde* which obliged the captain to have recourse to a sale of the goods. In conformity, therefore, to the rule that the proximate cause, and not that which is remote, is to be looked to, I think the underwriter is not liable. Giving the largest construction to the general words 'perils of the sea,' I think this is not a case of immediate loss by perils of the seas. Without going into an inquiry how far this resembles the case of jettison, or of general average, the discussion of which might arise future doubts, I say that perils of the sea are too remote a cause of the present loss to make the underwriter liable."

Lord Ellenborough's opinion was concurred in by Baily, J., and Abbott, J., the former saying:

> "I am entirely of the same opinion. It does not appear to me that this was a loss by a peril of the sea, or such as entitled the assured to recover, under the general words of the policy; but a loss for which the owners of the goods will be entitled to be reimbursed by the owner of the ship." * * * "To hold this a loss for which the underwriter is responsible would be to make his liability depend upon the accident of the captain's being unable to provide funds for the repair, except by means of the goods." * * * "Inasmuch, therefore, as we are bound, according to the common rule for the construction of policies, to look to the immediate cause of loss, and as this loss was not immediately caused by a peril of the sea, but by the inability of the captain to procure a fund for the repairs, which he was bound to do, it seems to me that this was not a loss within the policy."

In

Greer v. Poole, 5 Q. B. Div. 272,

a similar state of facts was presented and a similar ruling was made. The action was upon a marine policy of insurance which covered collision of the vessel. The ship having sustained damage by collision, was compelled to put into Gibraltar for repairs. The cargo, however, was undamaged. The master, not having funds with which to pay for the necessary repairs, made a bottomry loan upon the ship, freight and cargo. When the vessel thereafter arrived in Marseilles, the bond holder took proceedings to enforce his lien, and it became necessary for the owner of the cargo to pay a deficiency judgment in order to release his goods. He then sued his insurer claiming that his loss was due to the collision. Lush, J., said:

> "The proximate cause of the loss, *to which alone our law has regard,* was the inability of the agent of the shipowner to pay off the charge which he had for want of funds at Gibraltar created on the cargo."

In

Meyer v. Ralli, III Aspinall's Cases 324,

already discussed under an earlier heading in this brief, a similar application of the rule was made. In that case a vessel known as the "Unico" left Enos, a Turkish port, for Schiedam, in Holland, with a cargo consisting of 18,750 kilogrammes of rye, which the defendant insured to the owners. The "Unico" met with severe weather and was compelled to put into the French port of La Rochelle. Extensive litigation fol-

lowed in the English courts as a result of which on February 10, 1866, 5552 kilogrammes of rye were sold by order of the Tribunal of Commerce to pay for certain charges, and ultimately on January 10, 1867, the balance of the rye was sold to pay other charges. The "Unico" was a total loss and never completed its voyage, but it appeared that had the master of the vessel performed his duty, the balance of the rye other than the 5552 kilogrammes, could have been sent on to Schiedam, and made to bring a price greater than the total of the sums received upon the sale at La Rochelle, and all the charges which were decreed against it by the French court. The owners sued their insurer to recover their loss on the rye, alleging that it was proximately caused by the peril of the seas which had resulted in the loss of the "Unico." The English court held that the final and proximate cause of this loss was not the disaster to the "Unico" but was the result of the failure of the master of the "Unico" to perform his duty and transship the rye from La Rochelle to Schiedam. In so deciding, Archibald, J., said:

> "It is quite clear, therefore, that if the captain had done his duty, the portion of the cargo sold on the 10th Jan., 1867, would have been forwarded to Schiedam, and that there would in the event have only been a partial loss, the portion of the cargo forwarded being only liable to pay so much of the freight of forwarding from La Rochelle (Rosseto v. Gurney, 11 C. B. 176; 20 L. J. 257, C. P.), as exceeded the original rate of freight." * * * "Under these circumstances, it is impossible not to see that, although the ship and cargo were originally brought within the jurisdiction of the

> Tribunal of Commerce of La Rochelle by perils of the seas, *the sale of this portion of the cargo was not really due to any of the perils insured against, which had long ceased to operate in regard to this portion of the goods, but was in fact made for the purpose of paying advances incurred through the captain's breach of duty.*"

The case of

> *Ionides v. Univ. Marine Insurance Co.*, 32 Law. Jour. Com. Pleas 170; 14 English Ruling Cas. 271,

affords still another instance of application of the rule under discussion. In that case the plaintiff had shipped 6500 bags of coffee on the Str. "Linwood" from Rio de Janeiro to New Orleans and/or New York. The vessel left Rio May 26, 1861. On June 1, 1861, the "Linwood" arrived at the mouth of the Mississippi, and thence proceeded to New York. On June 17, 1861, the "Linwood" grounded off Cape Hatteras, the master having negligently mistaken his course. It appeared, moreover, that it was unknown to the master that the State of North Carolina was in a state of insurrection against the government of the United States, and that the light in the lighthouse on Cape Hatteras had been put out by the Confederates in order to embarrass Federal shipping. The "Linwood" belonged to Federal owners, and the cargo to British owners. The British owners (the plaintiffs) were insured by the defendant under a marine insurance policy which contained a warranty against loss resulting from hostilities. On July 19, 1861, 120 bags of the coffee were safely landed, and it was stipulated at the trial that but for the in-

terference of the Confederate militia, an additional 1000 of the bags could have been removed that day. On the 20th the vessel broke up and the balance of the 6500 bags of coffee were lost. The plaintiff sued the insurance company for the loss of all of the coffee with the exception of the 120 bags which were saved. The insurance company defended upon the ground that the proximate cause of the loss was not the negligence of the master in miscalculating his course, but that it was, in the first instance, the putting out of the light by the Confederates, and in the second instance the interference by the Confederates with the handling of the cargo. The court on these facts held the insurance company liable, but did so after the strictest application to the facts before it of the rule of proximate cause. It held that if the proximate cause of the loss had been the putting out of the light, or the subsequent interference with the landing, the loss would have been within the warranty against loss from hostilities, and the insurer would not have been liable, but it held, in the first instance, that the proximate cause of the stranding of the "Linwood" was the master's negligence in being off his course. In the second instance, it held that as to the 1000 bags of coffee the landing of which was prevented by the Confederates, the insurance company was not liable because they might have been saved but for the interference of the Confederates, and because, therefore, the proximate cause of their loss was the hostile act of the Confederates. As to the balance, however, it held the insurance company liable because, upon the facts stated, there was no possibility

of saving them after the vessel had stranded, and because it had concluded that the negligence of the master, and not the putting out of the Cape Hatteras light, was the proximate cause of the stranding.

The foregoing authorities establish the rule applicable under the English law to the situation involved in this case. That rule is, that when a vessel is stranded or sustains any loss through peril of the seas covered by the policy, nevertheless a recovery may not be had against the underwriters for any expense which is incurred by some later intervening cause. It only remains to show the application of the foregoing rule to the facts involved in the case at bar.

(b) The reshipment on the "Mackinaw" was not proximately caused by the stranding of the "Pleiades", but was caused by the necessity which the plaintiff was under by reason of its contract with the Panama Canal Commission.

The "Pleiades" had returned to San Francisco by the latter part of September, 1912. She was ready to resume her voyage by December, 1912. There was no evidence whatever offered of the fact that the explosives were perishable, and indeed, if such evidence had been offered, it would not have justified a reshipment, but a sale of the goods. However, the matter is not left within the realm of conjecture, but the real reason for the *immediate* reshipment of the goods without awaiting the completion of the repairs on the "Pleiades" is definitely stated by Mr. Mulhern, the manager of the plaintiff corporation. Mr. Mulhern testified as follows:

"Mr. Frank. What was the necessity of getting that cargo forwarded at that time?

A. If we did not deliver it within a certain time we were subject to a penalty of one-tenth of one per cent per day and were liable to have the shipment refused. Upon the condition their contract provided for that.

I don't believe there is any market at the port of destination other than the Panama Canal Commission for any considerable amount of explosives, and particularly, for those grades, as one of them was a grade 45% and the other 60, and the demand for 60 is not nearly as great as the lower grades." (Tr. p. 54.)

It must be taken, therefore, as an established fact that *the real and controlling reason* for the immediate transshipment of the explosives was the fact that the plaintiff corporation was under contract regulations with the Panama Canal Commission, and that the performance of its obligations to the Panama Canal Commission created a necessity for the immediate transshipment of the goods.

It requires no citation of authority to establish the point that the defendant underwriter was not bound in any way by the plaintiff's contract with the Panama Canal Commission, or by any obligation which the plaintiff corporation had assumed with reference to the ultimate disposition of the explosives after their arrival at Balboa.

Neither can it under any theory be contended that the loss to plaintiff under its contract with the Panama Canal Commission was a peril insured against under the policy of insurance.

The situation is a stronger one, for this reason, than any of those presented in the cases just cited. It bears a marked resemblance, however, to the situation in which the insured found himself in the cases of

Powell v. Gudgeon, supra,
Greer v. Poole, supra,
Pink v. Fleming, supra.

In each of those cases the insured found himself in a position, where, from causes with which the insurer had nothing to do, he was compelled to make certain expenditures.

In

Pink v. Fleming, supra,

after the vessel and cargo had been safely brought to port following the collision, the owner of the cargo sustained a loss through negligence of the stevedores, in the manner in which the cargo was handled while being unloaded.

In

Powell v. Gudgeon, supra,

the owner of the cargo sustained a loss because of the necessities of the captain of the vessel after the vessel had been safely brought to port after having suffered damage as a result of a peril insured against.

In

Greer v. Poole, supra,

the owner of the cargo sustained a similar loss resulting from the necessities of the captain after the vessel had been safely brought to port after encountering one

of the perils of the sea insured against. Here again the captain had been compelled to borrow money to make necessary repairs, and to hypothecate part of the cargo for that purpose. The court held that the loss occasioned to the owner in the redemption of the cargo, was not proximately caused by the original peril, but by the financial disability of the captain.

In all three of the cases, as well as in the other cases cited, the situation of the insured was strikingly similar to the insured in the case at bar. Here the vessel sustained a stranding, which was a peril insured against in the policy, but the vessel was brought to port in safety with the cargo unharmed, and might, for all that the insured knew at the time, and except for other contingencies which the policy did not cover, have completed its voyage, thereby rendering unnecessary the payment of any further reshipment charges. The return of the cargo to San Francisco, however, found the insured in a difficult situation which he had himself created, and against which the defendant had not insured. It found the insured under the obligation to immediately transship the goods, because of its contract with the Panama Canal Commission. For that reason, and for that reason alone (according to the positive statement of Mr. Mulhern, plaintiff's manager), the goods were forwarded at once upon the "Mackinaw", and the reshipment charges, which were subject to this litigation, were incurred. Upon these facts the application of the rule laid down by the English courts is clear. The proximate cause of the expenditure, therefore, was not the stranding of the

"Pleiades", but was the fact that the plaintiff corporation had entered into a contract with the Panama Canal Commission, and was, for that reason, unable to permit the cargo to remain in San Francisco until at such time as the "Pleiades" should be repaired and resume her voyage.

(c) The avoiding of delay in the arrival of the cargo at port of destination was the controlling and proximate cause of the reshipment and the payment of the additional freight. Both under the law of England, and by the express provisions of the policy in suit, the insurer was not liable for losses occasioned by delay in arrival at port of destination.

We have already pointed out by reference to the testimony of Mr. W. P. Mulhern, and otherwise, that the proximate cause of the reshipment on the "Mackinaw" was not the stranding of the "Pleiades", but was the necessity under which the plaintiff found itself to avoid any delay in the arrival of the goods at the port of destination.

Under the law of England it is thoroughly settled that under the English form policy an underwriter is not liable for delay in the arrival of goods at port of destination in the absence of an express provision to that effect in the policy.

The English Marine Insurance Act of 1906, section 55, subd. (b):

> "Unless the policy otherwise provides, the insurer on ship or goods is not liable for any loss proximately caused by delay, although the delay be caused by a peril insured against."

In

Taylor v. Dunbar, IV Com. Pleas L. R. 206,

the insurer sued the underwriters to recover damages sustained by a cargo of meat. It was shown that the vessel had met with tempestuous weather whereby the voyage had been delayed, and by reason of the delay had suffered from putrefaction. The court held for the defendant, the following opinion being rendered:

> "Keating, J.—Mr. Beasley has referred us to every authority which could at all favour the view he wished to present; but they do not, in my opinion, go far enough to sustain his argument. The facts stated in the case show beyond a doubt that the proximate cause of the loss of the meat was the delay in the prosecution of the voyage. That delay was occasioned by tempestuous weather; *but no case that I am aware of has held that a loss by the unexpected duration of the voyage, though that be caused by perils of the sea, entitles the assured to recover upon a policy like this.* I think we should be establishing a dangerous precedent if we were to give effect to Mr. Beasley's argument, seeing that there are so many cargoes which are necessarily affected by the voyage being delayed. I am not disposed to create such a precedent. I think our judgment ought to be for the defendant.
>
> "Montague Smith, J.—I am of the same opinion. The loss here has arisen in consequence of the putrefaction of the meat from the voyage having been unusually protracted. That is a loss which does not fall within any of the perils enumerated in this policy. To render the underwriters liable, it must be shown that the loss is proximately due to one of the known perils. *Retardation or delay of the voyage is not one of them.* The case states that the meat was not affected by the sea or by the storm. It was not, therefore, as Mr. Beasley wished us to assume, damaged by knocking about. If it had been, the case might

have been brought within the principle of Lawrence v. Aberdein, and Gabay v. Lloyd. But the statement in the case precludes us from drawing any such inference. If we were to hold that a loss by delay, caused by bad weather or the prudence of the captain in anchoring to avoid it, was a loss by perils of the sea, we should be opening a door to claims for losses which never were intended to be covered by insurance, not only in the case of perishable goods, but in the case of goods of all other descriptions. *By the common understanding both of the assured and assurers, delay in the voyage has never been considered as covered by a policy like this.* I therefore agree that our judgment should be for the defendant.

"Brett, J. I am also of opinion that damage to goods caused by delay of the voyage, through the consequence of stormy and tempestuous weather, is not one of the perils covered by an ordinary policy. *Such damage must have occurred many times, and yet no trace is to be found of such a claim being maintained. If it be desired, a clause may easily be inserted in the policy to meet the case.*" (Italics ours.)

Not only did the policy in the present case *not* contain a provision rendering the underwriters responsible for damages cause by delay, but, on the other hand, it was expressly provided in the policy as follows:

"Freight warranted free from any claim consequent upon loss of time whether arising from a peril of the sea or otherwise."

It therefore appears that, both by reason of the English law with respect to general form policies, and by the express provisions contained in the policy sued under, the defendant in this case could not be held liable for any loss resulting proximately from delay in the arrival of the explosives at point of destination.

It being thus shown that the reshipment on the "Mackinaw" was made for the purpose of avoiding the consequences of delay in the arrival of the explosives at the port of destination, and it being further shown that under the English law, as well as under the express provisions of the policy, the insurer is not liable for damages caused by such delay, it follows that the District Court erred in not holding the defendant free from liability upon this ground.

(d) The failure of the "Pleiades" to complete the voyage was caused by the insolvency of the California-Atlantic Steamship Company. Even had the plaintiff been willing to wait until the "Pleiades" was repaired, the proximate cause of the incurring of the reshipment charges would not have been the stranding of the "Pleiades", but the bankruptcy of the steamship company, which was a matter not insured against.

It is admitted that the "Pleiades" was returned to the California-Atlantic Steamship Company fully repaired and ready to complete her voyage, on December 27, 1912. It is also shown that the California-Atlantic Steamship Company became bankrupt on or about January 2, 1913, and that the "Pleiades" did not complete her voyage. From all that appears on the record the "Pleiades" could have proceeded on her voyage immediately after December 27, 1912. *On that date the effect of the stranding had been fully overcome.* If the "Pleiades" did not complete the voyage, it was because prior to January 2 or 3, 1913, her owners became insolvent.

For this reason it is clear that an additional intervening cause operated to prevent the completion of the

voyage. Had the defendant not been in a position by reason of its contract with the Panama Canal Commission which made it necessary for it to forward the cargo at once without awaiting the completion of the repairs on the "Pleiades", the voyage could have proceeded after December 27, 1912, and the plaintiff would not have been under any further liability with respect to the payment of additional freight. If, however, as stated, the voyage was never completed, it nevertheless appears that such failure was due entirely to the bankruptcy of the California-Atlantic Steamship Company. The effect of the stranding had been wholly overcome, and, but for said bankruptcy, the vessel could have proceeded on its voyage. The situation is one exactly analogous to one of the cases heretofore cited, where certain outside causes intervened and became the proximate cause of additional expenses being brought upon the assured, for which expenses the insurance company was not liable.

For the foregoing reasons it is respectfully submitted that the judgment of the District Court should be reversed with directions to enter judgment for defendant (plaintiff in error).

Dated, San Francisco,
February 13, 1918.

Respectfully submitted,

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